

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 9907

IN THE MATTER OF:

Served September 13, 2006

Application of TRANSCOM, INC.,)
for a Certificate of Authority --)
Irregular Route Operations)

Case No. AP-05-113

Application of TRANSCOM, INC.,)
for Temporary Authority --)
Irregular Route Operations)

Case No. AP-05-114

Applicant seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, including the driver. Applicant also seeks temporary authority.

Applicant was granted operating authority in 2000, but the issuance of a certificate of authority was expressly made contingent on applicant filing additional documents.¹ Applicant failed to file the necessary documents in a timely manner, thereby voiding the Commission's approval.²

Applicant currently provides service under a contract with the United States Bureau of Immigration and Customs Enforcement (ICE) using sedans and minivans with a seating capacity of less than 10 persons each, including the driver. The contract also calls for service in 15-passenger vans and 25 to 30-passenger minibuses, but applicant has subcontracted that service to an existing WMATC carrier. Prior to the ICE contract, applicant operated sedan and minivan service under a similar contract with ICE's predecessor, the Immigration and Naturalization Service (INS).

Applicant has filed a motion to dismiss the applications on the grounds that a WMATC certificate of authority is not required for the portion of the INS/ICE contract requiring service in sedans and minivans and that this is the only service applicant proposes.

The applications are opposed by WMATC Carrier No. 985, Executive Technology Solutions, L.L.C.

¹ See *In re Transcom, Inc.*, No. AP-00-81, Order No. 6053 (Dec. 4, 2000) (conditionally granting Certificate No. 582).

² See *id.* (grant of authority void upon applicant's failure to timely satisfy conditions of issuance); Commission Regulation No. 66 (failure to comply with conditions of grant within 180 days voids approval).

I. WMATC JURISDICTION OVER SEDANS AND MINIVANS

Applicant contends that sedan and minivan service under the INS/ICE contract does not require a WMATC certificate of authority by virtue of Article XI, Section 3(f), of the Compact, which, by reference to Article XI, Section 1(b), excludes from the Compact's certification requirement "taxicabs and other vehicles that perform a bona fide taxicab service."

Other vehicles that perform a bona fide taxicab service is defined in Regulation No 51-09 as follows:

Other vehicles that perform a bona fide taxicab service means vehicles other than taxicabs used to perform a service that is:

(a) transportation intended in good faith to be provided only between points selected at will by the person or persons hiring the vehicle in which such transportation is provided;

(b) conducted in a vehicle subject to the exclusive use of the passenger or single party of passengers hiring the vehicle for the entire time such vehicle is under hire;

(c) priced at rates based on the duration and/or distance of the transportation rendered;

(d) conducted in a vehicle engaged solely in rendering or performing transportation as described in subparagraphs (a), (b), and (c) above; and

(e) conducted in a vehicle having a seating capacity of eight passengers or less in addition to the driver.

"We strictly construe the meaning of ['bona fide taxicab service'] because such service is excluded from the Compact's certification requirements."³ "[O]ther vehicles that perform a bona fide taxicab service are quite simply those vehicles which 'behave like taxicabs but are not taxicabs.'"⁴

[A] taxicab charges rates based on the duration and/or distance of the transportation rendered. Put another way, the charge is not a flat rate for service where the operator of the vehicle bears the risk of unforeseen delays or deviations from the most direct route. Instead, the charge for service rendered bears some relation or proportion to the factors of time and/or distance so that the risks of unforeseen delays and/or deviations fall on those who hire the vehicle.⁵

³ In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 3 (Feb. 9, 1994).

⁴ In re O. Oluokun, Inc., t/a Montgomery County Limo, No. MP-93-43, Order No. 4225 at 2 (Dec. 16, 1993) (quoting In re Title II, Art. XII, § 1(c) of the Compact, No. MP-83-01, Order No. 2559 at 8 (May 24, 1984)).

⁵ Order No. 2559 at 9 (emphasis added).

"Flat fares -- fares that vary according to the selected destination but not according to the selected route or according to the amount of time required to traverse the selected route -- do not meet the duration and/or distance test of Regulation No. 51-09."⁶

According to the INS/ICE contract, applicant is required to conduct "regularly scheduled runs" in sedans from INS/ICE headquarters in the District of Columbia to "various points" in the Washington Metropolitan Area.⁷ Sedan drivers "may be directed to respond to personnel . . . pickup [requests for] other than regularly scheduled runs"⁸ Applicant is required to furnish additional sedans as needed "unless a van is specifically requested by [INS/]ICE."⁹ The base price for sedan and van service is expressed in terms of a "TOTAL FIXED PRICE" for one year.¹⁰ The price for "[a]dditional sedans and 7-passengers mini-van wagons" is based on a per trip charge and expressed in terms of an "EXTENDED AMOUNT" for 1,260 calls in one year.¹¹

Fixed price contracts and per-trip charges place the risks of unforeseen delays and/or deviations not on those who hire the vehicle but on the carrier and thus fail the duration or distance test of Regulation No. 51-09.¹² That applicant also is required to furnish "[o]ne to four additional sedans" on an "as needed basis" at a straight hourly rate does not alter our analysis. The bona fide taxicab service exclusion does not apply to service which only "occasionally exhibits the characteristics of taxicab service."¹³

We thus have no difficulty pronouncing the INS/ICE contract within our certification jurisdiction. Accordingly the motion to dismiss shall be denied.

II. APPLICATIONS AND PROTEST

Under Title II of the Compact, Article XI, Section 13(a), the Commission may grant temporary authority if there is an immediate need for service that is not available. Under Regulation No. 54-06(a), a temporary authority applicant must demonstrate fitness.

⁶ *In re Washington Exec. Sedan, Inc., & Global Express Limo. Serv., Inc.*, No. MP-02-03, Order No. 6772 (Aug. 13, 2002) (citing Order No. 4225 at 2).

⁷ ICE Contract at 17, (Driver/Sedan 1); INS Contract at 16, (same).

⁸ ICE Contract at 17, (Driver/Sedan 3); INS Contract at 16, (same).

⁹ ICE Contract at 18, ¶ B7; INS Contract at 17, ¶ 2.1L3-7.

¹⁰ ICE Contract at 1, CLIN 0001; INS Contract at 3, CLIN 0001 ("FIXED PRICE").

¹¹ ICE Contract at 1, CLIN 0003AA; INS Contract at 3, CLIN 0003 (per call).

¹² See *Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express, v. Madison Limo. Serv., Inc.*, No. FC-90-02, Order No. 3810 at 7 (Aug. 30, 1991) (fixed-charge contract not based on distance or duration).

¹³ Order No. 2559 at 10 (emphasis added).

The Compact, Title II, Article XI, Section 7(a), provides that the Commission shall issue a certificate to any qualified applicant, authorizing all or any part of the transportation covered by the application, if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

An application for a certificate of authority must be in writing, verified, and in the form and with the information that Commission regulations require.¹⁴ Commission Regulation No. 54 requires applicants to complete and file the Commission's application form. The form itself requires supporting exhibits. The evidence thus submitted must establish a prima facie case of fitness and consistency with the public interest.¹⁵

Once applicant has made its prima facie case, the burden shifts to protestant to contravene applicant's showing.¹⁶ If the protestant is an existing carrier, the burden is on protestant to show that competition from the applicant would adversely affect protestant to such a degree or in such a manner as to be contrary to the public interest¹⁷ -- such as the adverse effect on the public and applicant from unfair competition.¹⁸ The protest must be accompanied by all available evidence on which the protestant would rely.¹⁹

A. Applications

Applicant operates three sedans and two minivans under the INS/ICE contract.

Applicant verifies that: (1) applicant owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) applicant owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) applicant has access to, is familiar with and will comply with the Compact, the Commission's rules, regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

¹⁴ Compact, tit. II, art. XI, § 8.

¹⁵ *In re City Sightseeing USA Inc.*, No. AP-04-39, Order No. 8042 (June 1, 2004).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Old Town Trolley Tours of Washington, Inc. v. WMATC*, 129 F.3d 201, 202-03 (D.C. Cir. 1997) (standing upheld on allegation that applicant was unfit competitor willing to flout WMATC regulations).

¹⁹ Commission Regulation No. 54-04(a).

We find that applicant has complied with Regulation No. 54 and has established thereby a prima facie case of fitness and consistency with the public interest.

B. Protest

The gravamen of the protest is that applicant has engaged in unfair competition by operating without proper authority and, therefore, in violation of applicable regulatory requirements. Because we have held that the INS/ICE contract requires WMATC authority, the protest must be seen to allege operating without WMATC authority and, therefore, in violation of WMATC regulatory requirements. As we have already held in denying the motion to dismiss, applicant's past operations under the contract violated the Compact and Commission regulations thereunder.

When an applicant has a record of violations, the Commission considers the following factors in assessing the likelihood of future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.²⁰

Operating without authority is a serious violation. Applicant's president, Yoon S. Shin, explains that he believed, and still believes, that the INS/ICE contract was exempt under Commission Regulation No. 51-09. The issue is whether Mr. Shin was on notice that his interpretation was incorrect.

"The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. . . . The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to [deny a license application], it must give full notice of its interpretation."²¹ "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation."²²

The pricing section of the contract consists of several fixed-price segments. Most of the segments recite how the segment price was derived by multiplying an hourly, daily or monthly rate factor by a specified number of corresponding time units to yield a total segment

²⁰ *In re Executive Technology Solutions, LLC*, AP-04-84, Order No. 8273 (Sept. 20, 2004); *In re Maryland Express Transportation Inc.*, AP-03-84, Order No. 7418 (Sept. 24, 2003).

²¹ *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987).

²² *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (May 12, 1995).

price for the year. The per-trip segment price is similarly "extended" by multiplying the per-trip charge by an estimated number of trips per year.

The hourly, daily and monthly rate factors are clearly durational in nature, even though the resulting contract price is fixed. A search of Commission case law - the only public statements interpreting Commission Regulation No. 51-09 during the relevant time period - reveals a lack of any precedent holding that a fixed-price contract based on durational rate factors is not duration-based within the meaning of Regulation No. 51-09. Consequently, we cannot say that Mr. Shin was on notice that transportation performed under the portions of the contract based on durational factors was not exempt under Regulation No. 51-09.

Transportation performed at the per-trip charge is a different matter. A per-trip charge varies with respect to neither time nor distance and thus on its face fails the "duration and/or distance" test of Regulation No. 51-09(c). In this instance, the regulation itself provides the "ascertainable certainty" constituting "full notice."

III. CONCLUSION

We cannot determine the extent of the per-trip violations on this record. Our decision on these applications must await applicant's production of INS/ICE invoices in order to determine the number of days applicant performed the INS/ICE contract at the per-trip rate.

THEREFORE, IT IS ORDERED:

1. That Case Nos. AP-05-28 and AP-05-29 are hereby consolidated pursuant to Commission Rule No. 20-02.
2. That within thirty days applicant shall produce copies of all invoices submitted to INS/ICE for transportation at the per-trip rate for further proceedings consistent with this order.
3. That applicant may not transport passengers for hire under the ICE contract unless and until a certificate of authority has been issued.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES AND CHRISTIE:



William S. Morrow, Jr.
Executive Director